NO.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

[redacted]

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, et al.,

PETITIONERS,

V.

THE UNITED STATES OF AMERICA;
THE SECRETARY OF THE INTERIOR;
THE DIRECTOR OF THE MINERALS
MANAGEMENT SERVICE; and
SAMEDAN OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress create an affirmative duty for the Secretary of the Interior in Section 8(g)(3) of the Outer Continental Shelf Lands Act and thereby establish a consistent protocol for protection of federal and state non-renewable resources?

2. Did Congress intend to provide compensation to coastal states for drainage of their oil and gas reserves by payments made to the states under Section 8(g)(2) of the CCSLA and pretermit the states from asserting a proprietary interest.

3. Did Congress provide statutory consequences for a failure of the Secretary of the Interior to honor his duty under Section 8(g)(3)?

4. Did Congress intend to forbid litigation over the interpretation of Section 8(g)(3) of the CCSLA?

LIST OF PARTIES

The following additional parties are not listed in the caption: Cashco Oil Company, Seneca Resources Corporation and Pelto Oil Company. These parties were intervenors in the case below and join in this Petition for Certiorari before this Court.

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OPINION OF THE LOWER COURTS

The text of the Opinion of the United States Court of Appeals for the Fifth Circuit rendered November 25, 1987, appears in Appendix A to this Petition, and is reported at 832 F.2d 935 (5th Cir. 1987).

The Order of the United States Court of Appeals for the Fifth Circuit denying the Suggestion For Rehearing En Banc dated December 23, 1987, appears in Appendix B to this Petition.

The text of the Opinion of the United States District Court for the Western District of Louisiana rendered December 19, 1986, appears in Appendix C to this Petition and is reported at 656 F.Supp. 1310 (W.D. La. 1986).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was

entered on November 25, 1987. A Suggestion For Rehearing En Banc was denied on December 23, 1987. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

This case involves the direct interpretation of the following statutory provisions, the relevant portions of which are reproduced in Appendix D:

43 U.S.C. §1337(g)(2)
43 U.S.C. §1337(g)(3)

STATEMENT OF THE CASE

Introductory Statement

This case involves the interpretation of the 1986 amendments to the Outer Continental Shelf Lands Act ("OCSLA"). No reading of the bare facts of the history of this case, as found in the ordinary statement of a case, can reveal or even foreshadow its immense public importance. It presents significant questions

affecting the federal-state relationship associated with the production of hydrocarbons from offshore state lands and the outer Continental Shelf. The resolution of the issues presented will ultimately affect the allocation of billions of dollars in oil and gas reserves located under the adjoining lands of coastal states and the United States and will impact future federal-state cooperation in the conservation of these unrenewable resources which are vital to this country's security. If the decisions of the lower courts are allowed to stand, decades of federal-state cooperation in offshore oil and gas operations may be destroyed. The effect of the decision by the Fifth Circuit Court of Appeals is to encourage accelerated exploration, drilling and production activities designed to enhance the short range

financial status of the draining sovereign. This unwarranted and improvident race to production, at the expense of orderly and prudent development, could result in harm to the environment, wasteful drilling of unnecessary wells and lack of prudent conservation practices by leaving valuable hydrocarbons in the ground due to selective completion practices.

In the proceedings below, the Fifth Circuit disregarded the basic tenets of statutory analysis followed by other circuits. In refusing to conduct a meaningful examination of the legislative intent behind the statute at issue, the Fifth Circuit created an analytical conflict between it and the First and Tenth Circuits in similar cases. The result is a decision which defies the will of Congress. In addition, the courts

below have blindly refused to recognize that the congressionally granted rights of coastal states are protected by an express statutory remedy.

In reviewing this application, it is important to bear in mind, that although this case presents the legal issues involved in a factual setting in which the State of Louisiana and its lessees are being denied congressionally mandated protection against drainage of the State's resources by wells on federal lands and the federal government is deriving a resultant economic advantage, the legal issues presented are, in fact, neutral. In this instance, the Secretary's failure and refusal to effect unitization in violation of Section 8(g)(3) of the OCSLA has damaged the State and its lessees, but in future instances, his refusal to follow the congressional mandate will sanction

the loss of federally owned resources. It is predictable that if the Secretary refuses to do his duty when state interests are concerned, states will respond in kind by refusing to unitize. The result is a total frustration of the congressional will and the embracing of imprudent operational techniques which will cause the waste of vital national resources and the misallocation of economic resources to the drilling of unnecessary offshore wells.

HISTORY OF THE CASE

The State of Louisiana granted oil and gas leases to Cashco Oil Company, Seneca Resources Corporation, and Pelto Oil Company (all such lessees together with the State of Louisiana being hereinafter referred to as "Petitioners") affecting State offshore lands. The state leases abut the three-mile territorial

boundary separating state and federal lands. The United States, through the Department of the Interior and the Minerals Management Service, granted oil and gas leases to Samedan Oil Corporation on property immediately adjacent to the state leases. At least three significant oil and gas reservoirs underlie both the state leases and the federal leases. Although the great majority of the oil and gas reserves underlie the state side of the boundary, superior geological structural locations on the federal leases have allowed Samedan to drain Petitioners' oil and gas reserves across the boundary and produce hydrocarbons originally in place in Louisiana through wells on the federal side of the boundary. The Petitioners have not been provided with protection against the continuing drainage and have not been compensated for the past

drainage. The State of Louisiana has been deprived of substantial severance taxes and royalties which would have been attributable to the reserves underlying state lands had the common hydrocarbon bearing area been timely unitized and production equitably allocated. The lessees of the State were also deprived of their share of such production.

The Petitioners sought a declaratory judgment and injunctive relief alleging that the federal government through Samedan is draining the state's mineral resources: (1) in violation of the OCSLA, 43 U.S.C. §1337(g) ("Section 8(g)"), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, Sec. 8002, which imposes a duty on the Secretary of the Interior to effect unitization of common hydrocarbon bearing areas; (2) in violation of an agreed

policy and course of dealing between the United States and the State of Louisiana; and (3) in violation of the correlative rights of the State of Louisiana and its mineral lessees and contrary to the interest of conservation of oil and gas. The suit further alleged that the MMS refused to cooperate with the State in the unitization of these fields. Federal jurisdiction was based on 43 U.S.C. §1333(a)(2)(A), 43 U.S.C. §1349(a)(3) and (b)(1), 28 U.S.C. §1331, 28 U.S.C. §1361, and 28 U.S.C. §§2201 et seq.

The defendants claim that the new Section 8(g) amendments do not impose an obligation on the Secretary of the Interior to exercise due diligence to effect unitization agreements with the Governors of the coastal states and that compensation for drainage is provided for by revenue sharing under Section 8(g)(2).[1]

The District Court found that Samedan is draining hydrocarbons from competitive reservoirs common to both state and federal lands. However, the court ruled that since the extent of the drainage could be calculated and compensated in money damages, there was no irreparable injury. Injunctive relief was denied.

The federal defendants filed a motion for partial summary judgment based on their interpretation of Section 8(g). Samedan filed a motion for summary judgment as to all of Petitioners' claims. The District Court granted both summary judgment motions and, construing the federal defendants' jurisdictional motion as a FRCP 12(b)(6) motion, also granted that motion.

The District Court's decision was upheld by a panel of the Fifth Circuit Court, and rehearing was denied. For the

reasons expressed herein, the Petitioners pray that a Writ of Certiorari issue to review the judgment of the Fifth Circuit.

ARGUMENT

Introduction

In 1953, Congress enacted the OCSLA [2] and the Submerged Lands Act ("SLA")[3] to resolve the dispute over ownership of offshore lands and natural resources therein. Coastal states own and control the lands and natural resources within their respective boundaries (i.e., the greater of three miles from their coastlines or their historic seaward boundaries).[4] The federal government maintains power and control over the outer Continental Shelf (hereinafter referred to as the "OCS"), i.e., that portion of the Continental Shelf lying seaward of state-owned offshore lands.[5]

Although ownership of undersea minerals was allocated between state and federal governments, the SLA and the OCSLA did not resolve the question of how to account for oil and gas originally in place on one side of the boundary line but extracted or drained by wells drilled on the other. Historically, problems of net drainage across federal-state boundaries have been met through the practice of unitization of common reservoirs by federal and state agencies. Unitization is a legal concept designed for the joint operation and production of separately owned oil and gas leases which overlie a reservoir common to more than one lease. Rather than the lease owners competing for the reserves in the common reservoir, risking waste and being required to drill unnecessary wells, each party contributes ratably to the unit development costs and

shares the common unit production on a basis reasonably equivalent to the recoverable reserves beneath its own property. Between 1953 and 1978, 144 federal-state units were formed affecting production offshore of Louisiana.[6]

To abate federal-state dissonance over socio-economic and environmental issues, the OCSLA was amended in 1978 to restructure federal-state roles. Section 8(g), enacted as part of the 1978 amendments, provided that before the Secretary of the Interior could issue a lease within the 8(g) zone (i.e., the area lying three miles seaward of the federal-state boundary), he was required to supply geological, ecological and geographical information to the governor of the affected state. The Secretary was required to confer with the governor and attempt to arrive at an agreement for a

"fair and equitable" distribution of the revenues derived from the lease of any tract that might contain a common oil or gas pool or field. The section mandated that if the federal and state representatives could not agree, the funds were to be deposited in escrow and the right to them litigated in federal district court.

Shortly after passage of the 1978 amendments, disputes arose between the Secretary of the Interior and the states of Texas and Louisiana. The Secretary took the position that the affected coastal states were to be allowed to participate in revenues from leases within the 8(g) zone only to the extent that it was necessary to compensate them for drainage and not for any adverse economic or environmental impact suffered by the coastal states. Louisiana and Texas filed separate actions, asserting, among other

claims, that Congress intended Section 8(g) to compensate the coastal states for the economic and environmental effects of OCS operations.

The United States District Court for the Eastern District of Texas rejected the federal government's contention that Section 8(g) was intended to compensate the coastal states for drainage alone[7] and stated that the failure of Congress to include express statutory language that Section 8(g) revenues were limited to drainage compensation evidenced its intent that the sharing of such revenues had a broader purpose.[8] The case was appealed to the Fifth Circuit Court of Appeals. On June 29, 1984, Judge Mentz issued a similar ruling in State of Louisiana v. Secretary of the Interior.[9] Prior to final judgment in the Louisiana and Texas cases, Congress amended Section 8(g) in

1986. That amendment is the subject of this lawsuit.

The passage of the 1986 amendment was due, in large part, to the desire of Congress, to terminate the litigation over whether Section 8(g) was intended to provide compensation for economic and environmental impacts on coastal states. The revised policy statement[10] to the OCSLA makes it clear that the fixed formula for sharing of revenues created in Section 8(g)(2), which does not address drainage, is the vehicle by which coastal states are to be compensated for adverse economic and environmental impacts related to OCS development through sharing of revenues from bonuses, rentals and royalties derived from federal leases in the 8(g) zone.

Section 8(g)(3), on the other hand, addresses the protection of both the

federal government and the coastal states against the inequitable effects of drainage. That section confirms that unitization or, if appropriate, other royalty sharing agreements, will be the vehicles to assure that each sovereign is made whole for the actual or threatened loss of resources drained by activity of the other. This amendment codified the historical practice of unitization in such situations.

I. Section 8(g)(3): The Secretary's Duty

The newly enacted Section 8(g)(3) of the OCSLA manifesting congressional intent to protect the interests of both states and the federal government provides:

> (3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary

> shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2). (Emphasis added.)

This statutory provision imposes a duty on the Secretary to initiate a statutory process looking toward protection of coastal states and the federal government against drainage of oil and gas originally in place beneath their respective lands. Once that process is underway, to say, as the Fifth Circuit did, that the Secretary

"may" frustrate its clear purpose by arbitrarily refusing to exercise diligence and good faith in attempting to effect unitization is, at least, illogical. More importantly, it is to permit defiance of the congressional will. In its opinion, the Fifth Circuit held that the inclusion of "may" in the statute with respect to unitization or other royalty sharing agreements renders the clause totally discretionary. This conclusion - reflexively reached by the Court of Appeals without statutory analysis - conflicts with the analytical approach adopted by other federal circuits faced with the similar determinations of whether, despite use of the term "may", a statute nevertheless creates an affirmative duty.

Proper judicial analysis of "may" in a similar context is presented in the

First Circuit case of Commonwealth of Massachusetts v. Andrus[11], which also involved efforts by the Secretary of the Interior to avoid complying with congressional intent embodied in the OCSLA. At issue was the interpretation of Section 1334 of the OCSLA which, at the time of the operative events in the Andrus case, stated that the Secretary "may" take measures to promote conservation or prevent waste. Secretary Andrus, as Secretary Hodel has done in this case, argued that "may" only authorized him to take such measures and did not compel him to do so. The First Circuit rejected the Secretary's interpretation of "may":

> Under §5(a)(1) as then written, the Secretary's power to take measures to prevent waste and conserve natural resources was prefaced with the word "may", but we think the word as there used was not inconsistent with imposition of a duty. "Where a statute confers a power to be exercised for the benefit of the

public or of a private person, the word 'may' is often treated as imposing a duty rather than conferring a discretion." United States ex rel. Siegel v. Thoman, 156 U.S. 353, 359, 15 S.Ct. 378, 380, 39 L.Ed. 450 (1895); Supervisors v. United States, 71 U.S. (4 Wall.) 435, 18 L.Ed. 419 (1867); Mason v. Fearson, 50 U.S. (9 How.) 248; 13 L.Ed. 125 (1850); Thompson v. Clifford, 132 U.S.App.D.C. 351, 355, 408 F.2d 154, 158 (1968).

In our view, by conferring powers upon the Secretary to provide for "the prevention of waste and conservation of the natural resources of the Outer Continental Shelf," Congress had indicated, even in the earlier legislation, a serious concern with balanced use of all resources in the area. To grant such powers indicated an expectation that reasonable use would be made of them for their intended purpose. Selection of the word "may" reflected Congress's recognition that because of the unforeseeability of the problems that would arise, the Secretary had to have broad discretion in the choice of means. But we feel the provision implied an underlying duty to exercise due diligence that the resources be in fact protected. United States ex rel. Siegel v. Thoman, supra.[12] (Emphasis added.)

The Andrus case is a clear and proper recognition that Congress' expression of a legislative purpose is to be effected and cannot be frustrated by the willful inaction of the Secretary of the Interior or other administrative officials.

The Tenth Circuit Courts of Appeal also addressed the proper judicial analysis of "may" in Nevada Power Co. v. Watt[13]:

> On first impression, Interior's argument - that "may" means "may" - is appealing.
>
> * * *
>
> "'May' ordinarily connotes discretion, but neither in lay nor legal understanding is this result inexorable. Rather, the conclusion to be reached 'depends on the context of the statute, and on whether it. . .was the intention of the legislature to confer a discretionary power or to impose an imperative duty.'" (Citations omitted, emphasis added.)
>
> * * *
>
> Courts have construed "may" to mean "must" when the statutory context and legislative history

so required. (Citations omitted.)

* * *

"'Without question such a construction is proper in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power.'" United States ex rel. Siegel v. Thoman, 156 U.S. 353, 359, 15 S.Ct. 378, 380, 39 L.Ed. 450 (1895) (quoting Minor v. Mechanics' Bank, 26 U.S. (1 Pet.) 46, 64, 7 L.Ed. 47 (1828) (Story, J.)).

* * *

We must interpret the statute to effect its clear purpose. . . and "evidenced congressional intent". . . . The purpose suggested by the Act's structure is seemingly at odds with Congress' use of the word "may". Accordingly, this case is one in which we recognize that "while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,'. . .and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history.". . . .[14]

These cases tell us unmistakably that it is wrong to rule that "may" is purely permissive without fully examining the statutory context and the legislative

history to determine whether Congress intended to establish an affirmative duty. Both the Fifth Circuit and the District Court in this case evaded a thorough examination of the statutory context and legislative history of Section 8(g)(3) by ruling that "may" was purely permissive. Under the decisions in the First and Tenth Circuits, such cursory judicial analysis is unacceptable.

The legislative history of Section 8(g)(3) demonstrates that Congress intended to keep the respective sovereigns whole from drainage by the use of unitization agreements and that the Secretary is under a duty to exercise diligence and good faith to negotiate appropriate protective agreements. The Fifth Circuit's ruling that Section 8(g)(3) is totally discretionary is

completely unsupported by the underlying legislative history.

The Fifth Circuit relied on a virtual footnote to the 8(g) legislative history[15], an unintroduced draft of a bill, while it ignored the extensive legislative history on the bill that was introduced, was debated in committee and on the floor of Congress, and was ultimately enacted. As examples of their disregard of the legislative history, the Fifth Circuit ignored Senator Lloyd Bentsen of Texas, who stated:

> Both the State and Federal oil and gas will be protected from drainage by unitization or other royalty sharing agreement.[16] (Emphasis added.)

The Fifth Circuit even ignored Secretary Hodel, who conceded the mandatory nature of the Section 8(g)(3) process:

> In addition, to the unacceptable sharing of 27 percent of royalty

> revenues, the markup vehicle requires the Secretary to share even more "revenues from production of any potentially common hydrocarbon-bearing area.". . . While it appears to be protection against drainage, it is not expressly so limited, and leaves open the possibility that states will argue for a share of federal taxes. . . While the goal of protecting the states against drainage is sound, this provision is an unworthy attempt to serve that goal.[17] (Emphasis added.)

Numerous other statements of similar impact are found in the full legislative history.[18]

The lower courts have thus ignored the overwhelming weight of remarks by officials who directly commented on 8(g)(3) and spoke in mandatory terms of "will be protected", "ensuring that each party will be 'made whole'", and "requires the Secretary".[19] The lower courts failed to identify any legislative statements that Section 8(g)(3) is discretionary -

let alone totally permissive. As in the Andrus case, the "may" provision of Section 8(g)(3) created an "underlying duty to exercise due diligence" in fulfilling the obligations of the statute. It is of significance in this case that, as compared with the OCSLA provision under consideration in Andrus, Section 8(g)(3) provides the Secretary "shall" initiate its processes. The intent of the Congress - demonstrated both by the statutory context and the strong weight of the legislative history - was to create a mandatory process.

The Fifth Circuit held that the Secretary has no affirmative duty to act to achieve unitization of common potentially hydrocarbon bearing areas, although recognizing the clear intent of Congress to that very effect, which its decision then frustrates:

> Congress contemplated that the Secretary and the Governors would attempt to allocate royalty or unitize production from common reservoirs. . .[20]

The Court nevertheless refused to interpret the statute to effect that intent and held that the Secretary has no duty to exercise due diligence and good faith to effect unitization or other appropriate protection agreements.

In ruling that the Secretary's discretion is absolute and unreviewable, the lower courts have violated the canons of statutory construction that legal effect must be given to all parts of a statute and that a statute must be interpreted to avoid absurd results.[21] If Section 8(g)(3) imposes no duty on the Secretary, he has no motive to unitize in any case in which a revenue advantage can be gained through drainage. The same is true of coastal states. At the present

time situations exist where a state enjoys a structural advantage and is draining federal resources. The decisions of the lower courts encourage this result. If the Secretary fails to use all due diligence to protect the United States against drainage of its resources and resulting loss of revenues, one can envision oversight hearings in Congress. He is no less in dereliction of his congressionally imposed duty, simply because a state's resources are being drained. One must ask why Congress even bothered to enact 8(g)(3) if the Secretary has no duty. The lower courts' decisions have emasculated 8(g)(3), and virtually excised unitization from the CCSLA, a patently absurd construction which frustrates congressional intent.

II. Section 8(g)(2) Revenue Sharing Does Not Compensate For Drainage

Petitioners submit that it is imperative that the statutory source of drainage protection or compensation be expressly identified. It is undisputed that Congress intended that the federal government and the coastal states be protected against the inequitable effects of drainage.[22] If there is no meaningful protection in a discretionary 8(g)(3), what provision of the statute protects both governments against drainage?

The Fifth Circuit declared that because of its interpretation that Section 8(g)(3) is totally discretionary it "decline[s] to address Louisiana's underlying contention that state revenues derived from Section 8(g)(2) do not include drainage compensation. . . ."[23] If drainage compensation is not encompassed in 8(g)(2), and the Secretary, at

his whim, can refuse to entertain unit negotiations, the respective sovereigns and their lessees will be totally uncompensated for and unprotected against drainage of their hydrocarbons. This result defies the will of Congress.

In apparent justification of its holding that Section 8(g)(3) is absolutely discretionary, the Fifth Circuit stated: "The states are assured of substantial compensation by Section 8(g)(2)."[24] If that Court intended that the quoted sentence have any relationship to drainage, it failed to provide any plain meaning analysis or legislative history to buttress its belief despite the considerable significance of this utterance. By withholding their analysis, the Fifth Circuit has denied the Petitioners the opportunity to refute the judicial reasoning. However, a brief

examination of Section 8(g)(2) and the payments made thereunder will demonstrate the purpose of these payments and their relationship to this Section 8(g)(3) action.

The Section 8(g)(2) compensation pool is comprised of all bonuses, rents and royalties derived from production from the area between a coastal state's seaward boundary and a line three miles further seaward of that boundary. These revenues are shared in the proportion of twenty seven percent to the state and the remainder to the federal government.

Congress intended that these payments would address socio-economic and environmental impacts.[25] The legislative history demonstrates that such payments were not designed as compensation for drainage.[26] Indeed, it is clear that Congress intended that Section 8(g)(2)

payments would be "in addition to" drainage protection.

III. Statutory Consequences For Violating Section 8(g)(3)

While accurately articulating the intent of Congress that the Secretary and the Governors ". . . would attempt to . . . unitize production from common reservoirs. . . . " the Fifth Circuit is totally incorrect in stating that there are no statutory consequences for the Secretary's refusal to comply with that intent. The Fifth Circuit has ignored the fact that Section 1349 of the OCSLA is a generic enforcement provision established to remedy all violations of the OCSLA, including Section 8(g)(3). OCSLA violations are addressed by Section 1349(a)(1):

> . . .any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United

> States, and any other government instrumentality or agency. . . for any alleged violation of any provision of this subchapter. . . . (Emphasis added.)

Section 8(g)(3) provides the legal duty: that the Secretary would, with Governors of affected coastal states, ". . .attempt to allocate royalty or unitize production. . . ." The "statutory consequences" for the Secretary's violation of this duty are established in Section 1349, i.e. a person may seek an order compelling the Secretary to comply with the violated provision of the statute. This is precisely what the Petitioners have done in this suit. Louisiana brought suit pursuant to Section 1349, requesting that the Secretary be compelled to comply with his duty under Section 8(g)(3). Therefore, the Fifth Circuit was factually and legally in error in stating no statutory consequence exists

to remedy the Secretary's violation. Where there is a right, there is a remedy.[27] The rights created throughout the OCSLA - including 8(g)(3) - are protected by the remedy of Section 1349.

IV. Resolution Of Section 8(g) Dispute

The lower courts misread and misunderstood the congressional commentary concerning the legislative desire finally to resolve the Section 8(g) controversy. The Fifth Circuit stated that the 1986 amendments to Section 8(g) were intended to ". . .permanently settle disputes over OCS revenues."[28] This is not a dispute over OCS revenues or compensation. It is a suit to require the Secretary to comply with his Section 8(g)(3) duties. Therefore, the fact that the new act definitively established the components of future OCS revenues to be paid under Section 8(g)(2) does not affect this suit.

Congress intended to pass and did pass a bill which would finally and forever resolve the ambiguities of the 1978 version of Section 8(g). The issues which Congress intended to resolve are identifiable[29], did not include any dispute over or reference to protection of states and the federal government against drainage through the use of unitization agreements.

The Fifth Circuit cites Senator Johnston for the proposition that somehow the statute forbids this litigation.[30] The Fifth Circuit neglected to honor the full context of the Senator's comments quoted in its opinion. Just prior to stating that the legislation settles the "entire issue", Senator Johnston listed the components of the "entire issue": First - The amount of money in the escrow account and the percentages of division.

Second - The inclusion of existing royalties. Third - The inclusion of future royalties and the inclusion of revenues from all leases, whether issued before or after 1978 and whether the lease is wholly or partially within the outer limits of the 8(g) zone. Fourth - Recoupment provisions. After listing the issues and describing their legislative solution, the Senator concludes that the legislation will resolve <u>those</u> issues. He did not say that 8(g)(3) is, in effect, wasted congressional breath and that a party is forbidden to seek judicial relief from the Secretary's arbitrary refusal to comply with it.[31]

The lower courts held, in effect, that Congress can enact a new substantive statutory provision such as Section 8(g)(3) and then forbid any litigation over the ambiguities of that provision.

Such a result is, of course, absurd. Congress, in resolving the ambiguities of the 1978 statute, also enacted a new Section 8(g)(3) which contains an unresolved ambiguity. An attempt by Congress to deny judicial review of its own legislation would violate fundamental concepts of the doctrine of separation of powers. Judicial interpretation inferring such an intent is a rank abdication of the judicial power which denies the judicial review provided by Congress.

CONCLUSION

The precedential effect of this decision will have a direct impact on the financial and operational relationship between the federal government and coastal states in exploration, development and production of natural resources. If the decisions of the lower courts are allowed to stand, the result will be the drilling

of completely unnecessary wells designed only to accelerate production rates at the risk of injury to our environment, waste of natural resources, and misallocation of economic resources to drill unneeded wells. The sovereigns will be denied the proceeds attributable to their hydrocarbons which would have been realized pursuant to unitization agreements.

Congress did not intend this result. The Fifth Circuit's analysis of the use of "may" in Section 8(g)(3) violates the analytical precepts used by the First and Tenth Circuits in the Andrus and Watt cases, thus creating a conflict among the circuit courts of appeal. The failure of the Fifth Circuit to identify the statutory source of drainage protection in Section 8(g) could operate to deprive both sovereigns of congressionally intended protection. Last, the attempt by

the Fifth Circuit to forbid litigation over new substantive provisions of Section 8(g) violates the basic constitutional guarantees of the separation of powers and is a misinterpretation of the intent of Congress. For these reasons, the Petitioners submit that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT L. BOESE, Counsel of Record for Cashco Oil Company, Seneca Resources Corporation, Pelto Oil Company and The State of Louisiana, Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of the foregoing Petition for Certiorari have been served on this 5th day of February, 1988, each of the following, in each case by deposit of the copies to be served in a United States post office in Lafayette, Louisiana, with first class postage prepaid, properly addressed as follows:

1. Addressee: THE SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530

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It is hereby certified that all parties required to be served with the foregoing Petition for Certiorari have been listed and served as of this 5th day of February, 1988, in the manner described hereinabove.

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FOOTNOTES

[1] See the discussion of Section 8(g)(2) payments at pages 30-33 herein.

[2] 43 U.S.C. §§1331 et seq.

[3] 43 U.S.C. §§1301-1315.

[4] United States v. State of Louisiana, 382 U.S. 288, 86 S.Ct. 419 (1965).

[5] 43 U.S.C. §1332(a).

[6] Hearings On The Distribution Of Outer Continental Shelf Section 8(g) Revenues In Response To Instructions From The Budget Resolution Before The Senate Committee On Energy & Natural Resources, 99th Cong., 1st Sess. 68 (1985). (Hereinafter referred to as the "Senate Energy Committee, p. _____.")

[7] State of Texas v. Secretary of the Interior, 580 F.Supp. 1197 (E.D. Tex. 1984).

[8] 580 F.Supp. 1197, at 1207.

[9] State of Louisiana, Ex Rel. William J. Guste, Jr., Attorney General v. James G. Watt, Secretary, United States Department of Interior and United States of America, Civ. Act. No. 79-2965 (E.D. La. 1984). On September 3, 1985, Alaska also filed suit against the United States over the distribution of Section 8(g) revenues. Alaska's claims were very similar to Louisiana's.

10 The purpose of the amendments was described by Congress:

> [T]he distribution of a portion of the receipts from the leasing of mineral resources of the Outer Continental Shelf adjacent to State lands, as provided under Section 8(g), will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources. (Emphasis added). Pub. L. No. 99-272, §8002.

11 594 F.2d 872 (1st Cir. 1979).

12 Id. pp. 889-890.

13 711 F.2d 913 (10th Cir. 1983).

14 Id. pp. 920-921. Because of space restrictions in this application, discussion of the many "may-shall" cases cited in the Andrus and Watt cases is impossible. We commend these to the Court's attention and add the decision by the Fourth Circuit in United Hospital Center, Inc. v. Richardson, 757 F.2d 1445 (4th Cir. 1985), in which a state agency similarly attempted to interpret the word "may", to no avail, in administering Medicare and Medicaid regulations.

[15] For legislative support, the Fifth Circuit cited a draft of a Section 8(g) bill prepared by representatives of Alaska which was never introduced. State of Louisiana ex rel. William J. Guste, Jr. v. United States, 832 F.2d 935, 942 (f.n. 15) (5th Cir. 1987). The relative weight of an unintroduced draft of a bill is slight. For example, the Sixth Circuit stated: "Moreover, the language of rejected alternative legislation is not entitled to great weight in construing legislation that was finally passed, since the court has no way of knowing what motivated the legislature to take such action." United States v. Stouffer Chemical Co., 684 F.2d 1174, 1184 (6th Cir. 1982). See also American Medical Association v. Mathews, 429 F.Supp. 1179 (N.D. Ill. 1977).

[16] Cong. Rec. S15429 (daily ed. November 14, 1985) (Statement of Sen. Bentsen).

[17] Senate Energy Committee, p. 20.

[18] The Fifth Circuit also ignored the Merchant Marine and Fisheries Committee report, adopted by the House Budget Committee:

> In approving this provision, the Merchant Marine and Fisheries Committee is aware of the fact that several states and the United States have entered into unitization or other royalty sharing agreements with the Federal Government when it has been determined that the leasing activities by either the federal or State government has resulted

> in the drainage of oil or gas resources underlying the lands of the other party. The Merchant Marine and Fisheries Committee believes that these types of historical arrangements are a satisfactory method to be followed in ensuring that each party is "made whole" for the loss of resources which belong to the other. (Emphasis added.)

H. Rep. No. 300, 99th Cong. 550 (1985).

The "historical arrangements" referred to in the preceding statement are the traditional use of unitization agreements by the federal government and coastal states.

19 See text at pp. 25-26 and footnote 18, supra.

20 832 F.2d at 941.

21 See e.g., United States v. American Trucking Association, 310 U.S. 534, 60 S.Ct. 1059 (1940); Almendarez v. Barrett-Fisher Company et al., 762 F.2d 1275 (5th Cir. 1985); United States v. Second National Bank of North Miami, 502 F.2d 535 (5th Cir. 1974). See also 1A C. Sands, Sutherland Statutory Construction, §25.03, at 299 (4th ed. 1972).

22 This is best seen in the written comments of Senators Evans and Metzenbaum, two of the harshest critics of the 8(g) law:

> We have no objection to compensating states for drainage

> of oil and gas from their land caused directly by federal drilling activity within the 8(g) zone.

S. Rep. No. 146, 99th Cong. 1st Sess. 272, 274 (1985).

[23] 832 F.2d at 941.

[24] Id. at 941.

[25] See, e.g., the comments of Senator Wilson at 131 Cong. Rec. S15430 (daily ed. November 14, 1985) (statement of Sen. Wilson).

[26] Senators Evans and Metzenbaum unsuccessfully attempted to amend the bill to exclude royalties attributable to the 8(g) zone from the 8(g)(2) compensation pool. Senator Bentsen, in floor debate on the proposed Evans-Metzenbaum amendment, recognized that 8(g)(2) payments are distinct from drainage compensation:

> Mr. President, the State must be permitted to share royalty income in addition to drainage compensation. Current law specifically says that royalties are to be shared. That right is not limited in the statute to drainage. It is in fact possible that the refusal to share at least past royalties with the States would be unconstitutional. (Emphasis added.)

131 Cong. Rec. S15429 (daily ed. November 14, 1985) (statement of Sen. Bentsen).

Government officials who opposed various sections of the bill understood that Section 8(g)(2) payments do not include compensation for drainage. For example, recall the previously quoted comments of Secretary Hodel on the provision of the markup bill which ultimately became Section 8(g)(3):

> In addition to the unacceptable sharing of 27 percent of royalty revenues [which was eventually confected as Section 8(g)(2)], the markup vehicle requires the Secretary to share even more revenues from production of any potentially common hydrocarbon-bearing area. (Emphasis added.)

Senate Energy Committee, p. 20.

Senator Gorton of Washington, in support of the Evans-Metzenbaum amendment, stated:

> The Energy Committee's [8(g)(2)] provision [which is virtually identical to the form ultimately enacted] would give coastal states 27 percent of the rents, bonuses and royalty revenue for oil and gas tracts lying wholly or partially within the 8(g) zone - an area 3 to 6 miles off the coast of most states. Under the Energy Committee's scheme, these revenues would be given to the states regardless of whether a common pool of oil or gas existed.

> In other words, this provision would no longer be a mechanism to compensate states for drainage losses. (Emphasis added.)

131 Cong. Rec. S15425 (daily ed. November 14, 1985) (statement of Sen. Gorton).

[27] The District of Columbia Circuit Court of Appeals has stated:

> When agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates. (Citations omitted.)

Public Citizen Health Research Group v. Commissioner, Food & Drug Administration, 740 F.2d 21, 32 (D.C. Cir. 1984).

[28] 832 F.2d at 941.

[29] For example, the Secretary described the issues as: (a) The possible inclusion of taxes in the 8(g)(2) compensation fund; (b) Recoupment of proceeds which the Secretary failed to escrow in the old 8(g) account; (c) Inclusion of royalties in the compensation fund; and (d) Proration of tracts partially within the outer boundary of the 8(g) zone and partially outside that zone. Senate Energy Committee pp. 34-35, pp. 37-40.

30 The Fifth Circuit stated:

> Senator Johnston, one of the sponsors, made this objective [i.e. settling disputes over OCS revenues] clear:
>
> [T]he committee legislation settles the entire issue, and thus avoids the inevitable recurrence of future disputes over future 8(g) revenues. . . .
>
> * * * * * *
>
> Although this legislation offers the States considerably less than they sought, we feel it is a fair and equitable resolution. We believe this legislation will end current and future litigation over the 8(g) issue, and by giving the States a small stake in revenues from a small area of the OCS, will actually spur OCS development.
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> 131 Cong.Rec. S15,438 (daily ed. Nov. 14, 1985) (Emphasis added). This intention was stated by other senators as well.

State of Louisiana ex rel. Guste v. U.S., 832 F.2d 935, 941-942 (5th Cir. 1987).

31 131 Cong. Rec. S15437 (daily ed. November 14, 1985) (statement of Sen. Johnston).